EUROPE OF RIGHTS & LIBERTIES

Article 18 ECHR as a New Pillar of Judicial Independence and Separation of Powers

Aikaterini Tsampi

ABSTRACT

The case-law of the European Court of Human Rights on Article 18 of the European Convention on Human Rights has been significantly evolving the past years. In light, of this jurisprudential evolution, the present paper explores the connection between Article 18 violations and the principles of judicial independence and separation of powers. It explores, in particular, the extent to which such violations operate as 'barometer' and, in some cases, as 'verdict' even on the sanity of judicial independence and separation of powers within a State.

RÉSUMÉ

La jurisprudence de la Cour européenne des droits de l'homme relative à l'article 18 de la Convention européenne des droits de l'homme a considérablement évolué ces dernières années. À la lumière de cette évolution jurisprudentielle, le présent article explore le lien entre les violations de l'article 18 et les principes d'indépendance judiciaire et de séparation des pouvoirs. Il explore, en particulier, la mesure dans laquelle ces violations fonctionnent comme un « baromètre » et, dans certains cas, comme un « verdict » même sur le statut de l'indépendance judiciaire et de la séparation des pouvoirs au sein d'un État.

MOTS-CLÉS : Article 18 European Convention on Human Rights - judicial independence - separation of powers - *Miroslava Todorova v Bulgaria* - *Juszczyszyn v Poland*

Cite the paper:
Aikaterini Tsampi, "Article 18 ECHR as a New Pillar of Judicial Independence and Separation of Powers", *Europe of Rights & Liberties / Europe des Droits & Libertés,* 2023/1, n°7, pp. 369-381.

Article 18 ECHR as a New Pillar of Judicial Independence and Separation of Powers

Aikaterini Tsampi*

1. INTRODUCTION

There is no originality in noting that Article 6 of the European Convention on Human Rights (ECHR/Convention) is the fundamental pillar of judicial independence in the system of the Convention. It also comes as no surprise that the European Court of Human Rights (ECtHR/Court) invokes the principle of separation of powers in cases connected to the independence of the judiciary under the same provision.[1]

Notwithstanding the aforementioned observations, Article 6 ECHR is not the only relevant provision on the principles of judicial independence and separation of powers as far as the system of the Convention is concerned. Cases decided under Articles 5 and 10 ECHR indicatively exemplify the potential of provisions other than Article 6 to advance the requirements for judicial independence and separation of powers.[2] What this paper aims to demonstrate is that recent jurisprudential developments have rendered Article 18 a key provision for judicial independence and separation of powers in the ECHR system.

Article 18 provides that '[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'. While the wording of the provision is not revealing any connection whatsoever neither to judicial independence nor to separation of powers, recent scholarship has clearly accentuated the pertinence of Article 18 for the rule of law itself.[3] Relying on Article 18 literature, but also considering the most recent case-law on Article 18, the lines that follow will analyse in what ways Article 18 has become relevant for judicial independence and separation of powers.

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[1] Aikaterini Tsampi, 'Separation of Powers and the Right to a Fair Trial under Article 6 ECHR: Empowering the Independence of the Judiciary in the Subsidiarity Epoch' in Spano, Motoc, Lubarda, Pinto de Albuquerque and Tsirli (eds), *Fair Trial: Regional and International Perspectives = Procès équitable: perspectives régionales et internationales: Liber amicorum Linos-Alexandre Sicilianos* (2020) 693-708.

[2] *Ibid*. at 695.

[3] Floris Tan, 'The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?' (2018) 9(1) *Goettingen Journal of International Law* 109-141; Corina Heri, 'Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with Mala Fide Limitations of Rights' (2020) 1(1) *European Convention on Human Rights Law Review* 25-61; Aikaterini Tsampi, 'The New Doctrine on Misuse of Power under Article 18 ECHR: Is it about the System of Contre-Pouvoirs within the State after all? (2020) 38(2) *Netherlands Quarterly of Human Rights* 134-155; Basak Çali, 'History as an Afterthought: The (Re)discovery of Article 18 in the Case Law of the European Court of Human Rights' in Helmut Philipp Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical Perspective* (2021) 158-176.

The analysis will revolve around two axes. First, it will be argued that any violation of Article 18 ECHR relates to the principles of judicial independence and separation of powers, no matter what the status of the applicant is. Considering the actual state of the Court's case-law, a violation of Article 18 may qualify as general "barometer" or even as actual "verdict" on the status of judicial independence and separation of powers within the respondent State (2). Second, the paper will focus on the cases where the victims of Article 18 violations are judges themselves. The relevance of these cases for judicial independence and separation of powers is even more accentuated (3).

2. ARTICLE 18 VIOLATION: FROM "BAROMETER" TO "VERDICT" ON JUDICIAL INDEPENDENCE AND SEPARATION OF POWERS

Article 18 had been for long a dormant clause in the system of the Convention. Inspired by the *détournement de pouvoir* (misuse/misapplication of power) theory of French Administrative Law,[4] the 'anti-détournement clause' of the Convention,[5] while dear to numerous applicants throughout the years, was marginalised in the Court's practice[6] and only sporadically scrutinized in scholarly debate.[7] Its reinvigoration with the Grand Chamber judgment *Merabishvili v Georgia*[8] in 2017 dramatically converted this clause to a highly debated one. Even so, the number of cases in which the Court found a violation of Article 18 is not dramatically high to date, more than five years later.[9] The

[4] Under the French Administrative Law doctrine, misuse of power occurs either when the administrative act is foreign to any public interest (primary détournement de pouvoir) or when it is taken in a public interest, but not in the one for which the powers necessary to take the act have been conferred to its author (secondary détournement de pouvoir).

[5] ECtHR, GC, Merits and Just Satisfaction, 28 November 2017, *Merabishvili v Georgia*, n°72508/13, at paras 154 and 283.

[6] Concurring opinion of Judge Kūris in ECtHR, Merits and Just Satisfaction, 21 June 2016, *Tchankotadze v Georgia* Appiclation, n°15256/05, at paras 13-42.

[7] Before 2017, Article 18 would be the focus of a handful of studies/chapters in books: e.g. Vincent Coussirat-Coustère, 'Article 18' in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (eds), *La Convention européenne des droits de l'homme: commentaire article par article* (1999) 527; Dmytro Kotlyar, 'The challenges of arguing Article 18 at the European Court' (2012) 18 *EHRAC Bulletin* [6]-7; Pablo Santolaya, 'Limiting Restrictions on Rights. Art. 18 ECHR (A Generic Limit on Limits According to Purpose)' in García Roca and Pablo Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights* (2012) 527-536; Helmut Satzger, Frank Zimmermann and Martin Eibach, 'Does Art. 18 ECHR Grant Protection against Politically Motivated Criminal Proceedings? – Rethinking the Interpretation of Art. 18 ECHR against the Background of the New Jurisprudence of the European Court of Human Right [Parts 1 and 2]' (2014) 4 *European Criminal Law Review* 91-113 [Part 1] and 248-264 [Part 2]; Jean-Paul Costa, 'Sauvegarde, développement, destruction des droits et libertés' inElisabeth Lambert-Abdelgawad, David Szymczak, and Sébastien Touzé (eds), *L'homme et le droit: en hommage au professeur Jean-François Flauss* (2014) [207]-217; Joël Andriantsimbazovina, 'L'abus de droit dans la jurisprudence de la Cour européenne des droits de l'homme' (2015) 32 *Recueil Dalloz* 1854-1860; Corina Heri and Helen Rex Keller, 'Selective criminal proceedings and Article 18 ECHR: the European Court of Human Rights untapped potential to protect democracy' (2016) 36(1-6) *Human Rights Law Journal* 1-10.

[8] *Merabishvili v Georgia*, supra n 5.

[9] The Court has found violations of Article 18 in 24 cases from 2004 until the end of January 2023. Seventeen of these cases were decided since ECtHR, Merits and Just Satisfaction, 19 May 2004 *Merabishvili*: *Gusinskiy v Russia*, n°70276/01; ECtHR, Merits and Just Satisfaction, 13 November 2007, *Cebotari v Moldova*, n°35615/06 ; ECtHR, Merits and Just Satisfaction, 3 July 2012, *Lutsenko v Ukraine* Application, n°6492/11; ECtHR, Merits and Just Satisfaction, 30 April 2013, *Tymoshenko v Ukraine*, n°49872/11 ; ECtHR, Merits and Just Satisfaction, 22 May 2014, *Ilgar Mammadov v Azerbaijan* Application, n°15172/13 ; ECtHR, Merits and Just Satisfaction, 17

finding of a violation of Article 18 is considered a violation 'out of the ordinary' as it indicates that the rule of law is suffering within the respondent State. It would not be an exaggeration to holistically call Article 18 the "systemic rule of law clause" of the Convention, at least for the time being. In this alarming context for the rule of law within a State, the independence of the judiciary and the separation of powers are under pressure themselves. This is not necessarily explicitly stressed in the relevant cases, but one cannot disregard that an Article 18 violation may operate as a 'barometer' on the condition of judicial independence and separation of powers within a State (A). In some cases, even, such violation may as well function as 'verdict' on the threat against judicial independence *in globo* as the Court takes clear note of this threat (B).

A. Article 18 Violation as 'Barometer' on Judicial Independence and Separation of Powers

The general wording of Article 18 does not necessarily presuppose that the violation of this provision has specific characteristics as far as the threat to the rule of law in concerned. Considering the connection of the misuse of power under Article 18 ECHR with the *détournement de pouvoir* theory of French Administrative Law, one would legitimately expect that the prominent feature of a violation of Article 18 is bad faith and the moral reproach that it entails. This is not, however, the only determinative characteristic of an Article 18 violation. Apart from the psychological element inherent in the use of the restrictions permitted under the Convention for one or more ulterior purposes, a violation of Article 18 is a signal of a rule of law threat under which the judicial independence and the separation of powers themselves suffer.

Since *Merabishvili*, Article 18 became the provision synonym to the oppression of dissent within a State. Only that Article 18 is not simply about oppressing dissent within any State, but oppressing dissent in a State where there are serious indications that the

March 2016; *Rasul Jafarov v Azerbaijan*, n°69981/14 ; ECtHR, GC, Merits and Just Satisfaction, 28 November 2017, *Merabishvili v Georgia* Application, n°72508/13, (*Merabishvili v Georgia* Application No 72508/13, Merits and Just Satisfaction, 14 June 2016); ECtHR, Merits and Just Satisfaction, 19 April 2018, *Mammadli v Azerbaijan*, n°47145/14 ; ECtHR, Merits and Just Satisfaction, 7 June 2018, *Rashad Hasanov and others v Azerbaijan*, n°48653/13, 52464/13 and 65597/13; ECtHR, Merits and Just Satisfaction, 20 September 2018, *Aliyev v Azerbaijan*, n°68762/14 and 71200/14 ; ECtHR, Merits and Just Satisfaction, 15 November 2018, *Navalnyy v Russia*, n°29580/12, 36847/12, 11252/13, 12317/13 and 43746/14 ; ECtHR, Merits and Just Satisfaction, 9 April 2019, *Navalnyy v Russia (no 2)*, n°43734/14 ; ECtHR, Merits and Just Satisfaction, 7 November 2019, *Natig Jafarov v Azerbaijan*, n°64581/16 ; ECtHR, Merits and Just Satisfaction, 10 December 2019, *Kavala v Turkey*, n°28749/18; ECtHR, Merits and Just Satisfaction, 13 February 2020, *Ibrahimov and Mammadov v Azerbaijan*, n°63571/16, 74143/16 and 2883/17 ; ECtHR, Merits and Just Satisfaction, 27 February 2020, *Khadija Ismayilova v Azerbaijan (no 2)*, n°30778/15 ; ECtHR, Merits and Just Satisfaction, 16 July 2020, *Yunusova and Yunusov v Azerbaijan (no 2)*, n°68817/14; ECtHR, GC, Merits and Just Satisfaction, 22 December 2020, *Selahattin Demirtaş v Turkey (no 2)* n°14305/17 (ECtHR, Merits and Just Satisfaction, 20 November 2018, *Selahattin Demirtaş v Turkey (no 2)*, n°14305/17); ECtHR, Merits and Just Satisfaction, 18 February 2021, *Azizov and Novruzlu v Azerbaijan*, n°65583/13 and 70106/13 ; ECtHR, Merits and Just Satisfaction, 14 October 2021, *Democracy and Human Rights Resource Centre and Mustafayev v Azerbaijan*, n°74288/14 and 64568/16 ; ECtHR, Merits and Just Satisfaction, 19 October 2021, *Miroslava Todorova v Bulgaria* Application, n°40072/13 ; ECtHR, Merits and Just Satisfaction, 6 October 2022, *Juszczyszyn v Poland* Application n°35599/20; ECtHR, Merits and Just Satisfaction, 8 November 2022, *Yüksekdağ Şenoğlu and others v Türkiye*, n°14332/17 and 13 others ; ECtHR, Merits and Just Satisfaction, 24 January 2023, *Kutayev v Russia* Application, n°17912/15.

judiciary and the legislative are not in a position to effectively check the government and where the latter tries to both exploit and solidify its dominant position.[10] The typology of cases in which the Court has found a violation of Article 18 allows us to conclude that a violation of Article 18 reflects the attempts of the executive branch of government to control any source of power within the State that opposes it.[11] In a relevant study, in which the case-law until the end of 2019 was considered, we held that a violation of Article 18 ECHR is connected to the *male fide* effort of the executive branch of government to erode the social, political and economic monitors within a State.[12] However, for the executive to achieve this ulterior purpose it is also required that the institutional monitors, namely the judicial and the legislative branch of government, fail to avert this erosion.[13] The failure of the judiciary to protect the applicants against a hidden agenda does not necessarily have to fall within an orchestrated attempt by both the executive and the judiciary from the beginning. It is not necessary that both branches of government share and serve a common ulterior purpose from the outset. For a violation of Article 18 to occur, the sole failure of the judiciary to act as a *contre-pouvoir – ergo* the failure to unveil the ulterior motive of the executive – suffices.[14] The cases decided by the Court ever since these conclusions were drawn continue to corroborate this conclusion.[15]

The Court has particularly highlighted the failure of the judicial branch of government to hinder the achievement of the ulterior purpose pursued by the executive. In the post-*Merabishvili* cases in which the Court found violations of Article 18 ECHR against Azerbaijan, the role of the judiciary was particularly observed. The Court assessed the function of judicial control over the acts of the executive, namely the detention of the applicants, members of civil society, for ulterior purposes. Both in *Ilgar Mammadov* and *Rasul Jafarov*, the Court observed that with respect to the judicial review of the lawfulness of the applicant's detention, the domestic courts 'limited their role to one of mere automatic endorsement of the prosecution's requests' without conducting a 'genuine' review of the 'lawfulness' of the detention'.[16] In *Aliyev*, but also in more recent cases against Azerbaijan, the Court did not only emphasised the lack of genuineness in the judicial review conducted in the case of the applicant but also its lack of independence.[17] It is noteworthy that in some cases even, the Court observed that the failure of the judiciary was systematic.[18] In *Aliyev*, in particular, the Court insisted more on the role of the judiciary. In its observations under Article 46 of the Convention, and taking also into consideration the rest of the cases where Azerbaijan was found to have breached Article 18, the Court

[10] Aikaterini Tsampi, 'The Role of Civil Society in Monitoring the Executive in the Case-Law of the European Court of Human Rights: Recasting the Rule of Law' (2021) 17(2) Utrecht Law Review 102, at 112.
[11] *Merabishvili v Georgia*, supra n 5 at para 324.
[12] Aikaterini Tsampi, supra n 3.
[13] *Ibid*. at 148-150.
[14] *Ibid*. at 149.
[15] Supra n 9.
[16] *Ilgar Mammadov v Azerbaijan*, supra n 9 at para 118; also, *Rasul Jafarov v Azerbaijan*, supra n 9 at para 143.
[17] *Aliyev v Azerbaijan*, supra n 9 at 172; also, *Khadija Ismayilova v Azerbaijan (no 2)*, supra n 9 at para 91; *Yunusova and Yunusov v Azerbaijan (no 2)* supra n 9 at 117.
[18] *Aliyev v Azerbaijan*, supra n 9 at para 224; also, *Khadija Ismayilova v Azerbaijan (no 2)* supra n 9 at para 91.

> consider[ed] important to stress, as a matter of concern, that the domestic courts, being the ultimate guardians of the rule of law, systematically failed to protect the applicants against arbitrary arrest and continued pre-trial detention in the cases which resulted in the judgments adopted by the Court.[19]

Certainly, it should be noted that even in cases where the Court openly addressed the failure of the judiciary as systematic, it did not necessarily link the violation of Article 18 to the lack of judicial independence *in globo* within the State at hand. In other words, for a violation of Article 18 to be found, it is not necessary for the applicant to prove that the judicial system within the State at hand is not independent from the other branches of government, the executive in particular. Certainly, even if the lack of independence of the judiciary is not a prerequisite for the triggering of Article 18 ECHR, a violation of Article 18 still operates as 'barometer' for the judicial independence within a State. The cases where an Article 18 violation occurs reflect the efforts of the executive to silence their opponents through *mala fides* restrictions of their rights. After all, post-*Merabishvili*, the Court is routinely employing contextual evidence that corroborate the existence of the ulterior purposes on the part of the executive. In such settings, it would be hard to claim that the judiciary was ignorant of the situation, especially since the applicants are high-profile figures of the opposition. It would not be an exaggeration to claim thus that the failure of the judiciary to put an end to the hidden agenda of the government can be attributed to its lack of independence, as judges are unwilling or unable to put an end to the ulterior purposes of the government.

The Court openly linked the attitude of the judicial authorities in the applicant's case to the influence of the political climate in *Selahattin Demirtaş (No. 2) v Turkey*.[20] The case concerned the unforeseeable lifting of the applicant's parliamentary immunity and pre-trial detention on terrorist charges for political speeches. The Court found that the pre-trial detention of the applicant, dominant figure of the political opposition in Turkey, pursued the ulterior motive of stifling pluralism and limiting freedom of political debate.[21] The judgment issued by the Chamber in 2018 noted in particular the influence of the political climate after the coup d'état in Turkey:

> the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency. In that context, concordant inferences drawn from this background support the argument that the judicial authorities reacted harshly to the applicant's conduct, bearing in mind his position as one of the leaders of the opposition, and to the conduct of other HDP members of parliament and elected mayors, as well as to dissenting voices more generally.[22]

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[19] *Aliyev v Azerbaijan*, supra n 9 at para 224.
[20] *Selahattin Demirtaş (No. 2) v Turkey*, supra n 9.
[21] *Ibid*. at para 273.
[22] *Ibid*. at para 271.

Even so, the Chamber did not *expressis verbis* link the situation at hand with the lack of independence of the judiciary *in globo*. This point was taken up by Judge Karakaş in his dissenting opinion in which he doubted that the existence of ulterior purpose can be proved unless 'the Court had found that the Turkish justice system was not sufficiently independent from the executive'.[23] To further corroborate his argument the dissenting judge referred to the findings of the Court in *Merabishvili*. In *Merabishvili*, the Court denied to find a violation of Article 18 on the assertion that the ulterior purpose of the applicant's detention was principally to remove him from Georgia's political scene; it considered that factors deriving from the broader political context in which the criminal case was brought against the applicant were not sufficient proof in that respect.[24] Among others, the Court did not find that the statements about the criminal cases against opposition figures by officials from the executive were seen as 'proof of ulterior purpose behind a judicial decision' since there was no 'evidence that the courts were not sufficiently independent from the executive authorities'.[25]

Even though it is true that in *Merabishvili* the Court did not consider the general political climate as proven to have an impact on the judiciary because the latter was sufficiently independent from the executive, this does not imply that for a violation of Article 18 to occur the applicant has to prove the lack of independence of the judiciary in its entirety. In *Merabishvili*, the Grand Chamber did not find prove of ulterior purpose 'behind [the] judicial decision'[26] itself. For a violation of Article 18 to occur there is no need to prove that the ulterior purpose was shared between the executive and the judiciary; it is enough to prove that the judiciary did not avert the implementation of the ulterior purpose of the executive. If by implication this means that the judiciary is not independent enough from the executive, this is a different story. In such a context the violation of Article 18 operates as 'barometer' of the judicial independence within the State at hand. Such a finding does not exclude the fact that an Article 18 violation can also operate as 'verdict' on the status of judicial independence within a State, as it will be discussed in the next section.

B. Violation of Article 18 as "Verdict" on Judicial Independence

The previous section demonstrated that a violation of Article 18 ECHR occurs when the judiciary fails to avert the implementation of the hidden agenda of the executive to oppress its dissenters. In such a context, the system of 'checks and balances' within the State suffers. The same can be said for the judicial independence itself.

In the vast majority of cases, the Court did not make an explicit reference to the status of the judicial independence within the respondent State. The Court employed

[23] Partly dissenting opinion of Judge Karakaş in *Selahattin Demirtaş (No. 2) v Turkey*, supra n 9 at para 7.
[24] *Merabishvili v Georgia*, supra n 5 at para 322.
[25] *Ibid*. at para 324.
[26] *Ibid*.

contextual evidence that reflect the ulterior purposes of the executive mostly, by considering reports and opinions adopted by international observers. Even so, however, these reports did not necessarily reflect on the status of judicial independence within the State at hand. The Court did not go as far to suggest that the judiciary was not sufficiently independent from the executive, since strictly speaking this was not necessary for it to find a violation of Article 18 ECHR.

In this context, the observations of the Grand Chamber in *Selahattin Demirtaş (No. 2) v Turkey* of 2020 are noteworthy. Even though the Grand Chamber held the same conclusion as the Chamber with respect to the existence of a violation of Article 18,[27] the Grand Chamber, unlike the Chamber, relied on extensive contextual evidence on the independence of the judicial system in Turkey. More specifically the Court focused on the findings of international observers on the Supreme Council of Judges and Prosecutors ('the Supreme Council') as it considered it 'relevant to the Court's examination under Article 18 of the Convention'.[28] The Grand Chamber relied on the findings of the Venice Commission which characterised the new composition of the Supreme Council 'extremely problematic' and took the view that

> the composition of the Supreme Council would seriously endanger the independence of the judiciary, because it was the main self-governing body of the judiciary, overseeing appointments, promotions, transfers, disciplinary measures and the dismissal of judges and public prosecutors.[29]

In addition to these findings, the Court considered other reports indicating the impact of the political climate in the State:

> the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency, when hundreds of judges were dismissed, and especially in relation to criminal proceedings instituted against dissenters.[30]

Overall, the Grand Chamber not only relied on the intense political climate that influenced the judicial function in the State, but it also assessed structural reforms that have an impact on the judicial body *in globo*.

With *Selahattin Demirtaş (No. 2)*, the Grand Chamber explicitly put judicial independence on the picture in a way that one can legitimately hold that such findings

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[27] GC, *Selahattin Demirtaş (No. 2) v Turkey*, supra n 9 at para 437.
[28] *Ibid*. at para 434. Cf. partly concurring, partly dissenting opinion of Judge Yüksel in *Selahattin Demirtaş (No. 2) v Turkey* [Grand Chamber], supra n 9 at para 28.
[29] GC, Selahattin Demirtaş (No. 2) v Turkey, supra n 9 at para 434.
[30] *Ibid*.

not only operated as verdicts on Article 18 but also on judicial independence as such.[31] Even so, the Court did not refer to the notion of separation of powers. Notwithstanding the fact that the references of the Court to the separation of powers are growing both in quantitatively and qualitatively, especially in the cases against Poland where the Court assesses the structural reforms of the judiciary of these recent years, the Court does not necessarily make the connection between the importance of the separation of powers and the lack of judicial independence in cases where Article 18 is violated. Such an explicit connection would have been welcomed especially when Article 18 ECHR violations qualify as indicators of structural deficiencies in the relation between the branches of government within a State. Certainly, one cannot disregard the more recent Article 18 case-law on cases brought before the Court by members of the judicial themselves. As it will be indicated in the next chapter, this time, separation of powers made its way in Article 18 jurisprudence.

3. TARGETING JUDICIAL INDEPENDENCE AND SEPARATION OF POWERS: ULTERIOR PURPOSE IN ARTICLE 18 VIOLATIONS

The first - and quantitatively still dominant - set of cases in which the Court found a violation of Article 18 ECHR pertained to the restriction of rights of prominent figures of civil society or political opposition.[32] In such settings, as argued above, judicial independence was a pertinent feature of the case to the extent that the oppression of the dissenters under Article 18 could not occur in a setting of a judicial system that could operate independently. However, the ulterior purpose of the executive was not necessarily connected to undermining judicial independence itself. The targeting of the executive pertained to a number of social and political monitors of the executive but not to its main institutional check, the judiciary itself. Almost four years lapsed since *Merabishvilli* for the Court to find a violation of Article 18 in a case brought before it by a member of the judiciary itself (A). The cases brought before the Court by judges have a determinative value for the connection between Article 18 and the principles of judicial independence and separation of powers (B).

A. Judges in support of judicial independence and separation of powers as victims of Article 18 violations

[31] See similarly, *Yüksekdağ Şenoğlu and others v Türkiye*, supra n 9 at paras 637 and 638.

[32] *Gusinskiy v Russia*, supra n 9; *Cebotari v Moldova*, supra n 9; *Lutsenko v Ukraine*, supra n 9; *Tymoshenko v Ukraine*, supra n 9; *Ilgar Mammadov v Azerbaijan*, supra n 9; *Rasul Jafarov v Azerbaijan*, supra n 9; *Merabishvili v Georgia* supra n 9; *Mammadli v Azerbaijan* supra n 9; *Rashad Hasanov and others v Azerbaijan* supra n 9; *Aliyev v Azerbaijan*, supra n 9; *Navalnyy v Russia*, supra n 9; *Navalnyy v Russia (no 2)*, supra n 9; *Natig Jafarov v Azerbaijan*, supra n 9; *Kavala v Turkey*, supra n 9; *Ibrahimov and Mammadov v Azerbaijan*, supra n 9; *Khadija Ismayilova v Azerbaijan (no 2)*, supra n 9; *Yunusova and Yunusov v Azerbaijan (no 2)*, supra n 9; *Selahattin Demirtaş v Turkey (no 2)*, supra n 9; *Azizov and Novruzlu v Azerbaijan*, supra n 9; *Democracy and Human Rights Resource Centre and Mustafayev v Azerbaijan*, supra n 9; *Yüksekdağ Şenoğlu and others v Türkiye*, supra n 9; *Kutayev v Russia*, supra n 9.

Until now the Court has found Article 18 violations in two cases in which the applicants were judges. The first case, *Miroslava Todorova v Bulgaria*,[33] was decided in 2021 and the second one, *Juszczyszyn v Poland*,[34] one year later. The two cases present both convergencies and divergencies that enlighten the connection between Article 18 and the principles of judicial independence and separation of powers.

The common denominator of the aforementioned cases was the sanctioning of members of the judiciary for actions that aimed in the defence of judicial independence within the respective States. In *Miroslava Todorova* the Court found a violation of Article 18 in conjunction with Article 10 as the predominant purpose of the disciplinary proceedings against the applicant and of the sanctions imposed on her was to penalise and intimidate her on account of her criticism of the Bulgarian Supreme Judicial Council and the executive. The applicant's criticism had aimed to strengthening the independence of the judiciary.[35] On a similar vein, the Court ruled that the disciplinary measures that had been taken against Mr Juszczyszyn leading to his suspension, were incompatible with Article 18 in conjunction with Article 8. Indeed their ulterior purpose was to sanction him and to dissuade him from assessing the status of judges appointed upon the recommendation of the recomposed National Council of the Judiciary by applying the relevant legal standards, including those stemming from Article 6 (1) ECHR.[36]

Nonetheless, these two cases are significantly different too. In *Miroslava Todorova*, the applicant was targeted for activities relevant to the operation of the judiciary but conducted outside her official judicial duties *stricto sensu*. At the relevant time the applicant had been President of the BUJ. Her role and her duty consisted primarily in defending the professional interests of the members of that organisation, inter alia by making public pronouncements about the functioning of the judicial system, the need for its reform or the imperative of maintaining judicial independence.[37] On the contrary, in *Juszczyszyn*, the applicant was targeted for the manner in which he exercised his official judicial functions. Furthermore, while the actions of both judges aimed at the defence of judicial independence, it cannot be disregarded that the status of judicial independence in the respective States is not necessarily the same. This is reflected in the respective judgments too, even though both found Article 18 to be violated.

It is noteworthy that in *Miroslava Todorova* the Court did not find a violation of Article 6 with respect to the applicant as it saw no evidence of lack of independence and impartiality on the part of the Supreme Administrative Court.[38] On the contrary, in

[33] *Miroslava Todorova v Bulgaria*, supra n 9.
[34] *Juszczyszyn v Poland*, supra n 9
[35] *Miroslava Todorova v Bulgaria*, supra n 9 at para 213.
[36] *Juszczyszyn v Poland*, supra n 9 at para 337.
[37] *Miroslava Todorova v Bulgaria*, supra n 9 at para 8.
[38] *Ibid*. at para 123.

Juszczyszyn, not only did the Court found a violation of Article 6,[39] but it also considered its own findings along with those of other international bodies on the impact of the judicial reform in Poland on the independence of the judiciary *in globo*:

> [A]s a result of the successive reforms, the judiciary – an autonomous branch of State power – was exposed to interference by the executive and legislative powers and thus substantially weakened".[40] The Court had already found that the main objective of the reforms was for the legislative and the executive powers "to achieve a decisive influence over the composition of the NCJ which, in turn, enabled those powers to interfere directly or indirectly in the judicial appointment procedure.[41]

This juxtaposition does not alter our findings in the previous chapter as per the relevance of Article 18 for judicial independence. On the contrary, it corroborates the finding that a violation of Article 18 may operate as 'barometer' or 'verdict' for the status of judicial independence within a State. While it is true that in *Miroslava Todorova* the Court did not accept the existence of a structural problem with respect to judicial independence in Bulgaria in the same fashion as it did in *Juszczyszyn* or *Selahattin Demirtaş (No. 2),* the finding of violation of Article 18 is still telling as per the judicial independence within that State. Targeting a member of judiciary for their legitimate efforts to uphold judicial independence is an indicator in itself. After all, in its effort to establish the existence of this ulterior purpose, the Court noted the lively debates in Bulgarian society concerning the independence and effectiveness of justice, in particular concerning the treatment of organized crime affairs, and the fact that disputes have taken place between the association of judges represented by the applicant, and the executive.[42] Furthermore, as far as *Miroslava Todorova* is always concerned, one cannot disregard the relevant observations of two dissenting judges, judge Harutyunyan and the *ad hoc* judge Salkova. The dissenting judges were in favor of finding a violation of Article 6 due to lack of objective impartiality of the tribunal that decided the applicant's case.[43] In particular they suggested that there was evidence of lack of stability of the Bulgarian judicial system itself to the extent that this stability depends on the independence from the political organs.[44] They noted, in particular, the lack of clear rules that are equitably applied to all judges in the case of the evolution of judges' careers.[45]

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[39] *Juszczyszyn v Poland*, supra n 9 at paras 211 and 215.
[40] *Ibid*. at para 322.
[41] *Ibid*. at para 323.
[42] *Miroslava Todorova v Bulgaria*, supra n 9 at para 206. In particular, the Minister of the Interior made statements to the press that targeted the applicant personally and criticized her work as a judge.
[43] Partially dissenting opinion of Judge Harutyunyan and Ad Hoc Judge Salkova in *Miroslava Todorova v Bulgaria*, supra n 9 at para 252.
[44] *Ibid*.
[45] *Ibid*.

Even if it can be argued that both *Miroslava Todorova* and *Juszczyszyn* are reflecting on the status of the judicial independence within the State, it cannot be disregarded that *Juszczyszyn* may operate as 'verdict' on judicial independence in Poland in itself.

B. *Juszczyszyn v. Poland*: Putting Separation of Powers in the picture

The finding of a violation of Article 18 in conjunction with Article 8 in the case of *Juszczyszyn* is of particular pertinence. While the connection between judicial independence and the balance in the relations between the different branches of government are connected to an Article 18 violation, the Court explicitly linked the three in *Juszczyszyn*.

Just like in *Selahattin Demirtaş (No. 2)*, in *Juszczyszyn* the Court considered contextual evidence on the status of judicial independence *in globo* in Poland. As the Court clearly put it: "In its assessment of the applicant's complaint under Article 18 the Court must have regard to judicial independence, which is a prerequisite to the rule of law."[46] This time the Court had its own findings to also rely on, apart from those adopted by other international bodies. It considered in particular the the general context concerning the reorganisation of the judiciary in Poland as noted in *Grzęda*, a case exclusively decided under Article 6 ECHR.[47] *Grzęda* clearly indicated that the Grand Chamber's approach to the principle of judicial independence moved away from its traditional understanding as individual right for the parties to a judicial dispute and embraced instead the general duty for the State to safeguard the independence of the judiciary in its entirety.[48]

This time, the reference to judicial independence was accompanied by the explicit reference to separation of powers. The Court reiterated

> that it must be particularly attentive to the protection of members of the judiciary against measures that can threaten their judicial independence and autonomy, given the prominent place that the judiciary occupies among State organs in a democratic society and the importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary.[49]

The reference to separation of powers, here, did not introduce any new approach or test as far as the implementation of the ECHR requirements are concerned. However, the fact that the Court explicitly referred to the separation of powers, in conjunction with judicial independence, is not without significance. The Court for the first time clearly

[46] *Juszczyszyn v Poland*, supra n 9 at para 333.
[47] ECtHR, GC, Merits and Just Satisfaction, 15 March 2022, *Grzęda v Poland* Application No 43572/18.
[48] Mathieu Leloup and David Kosař, 'Sometimes even easy rule of law cases make bad law. Case note on: ECtHR, GC, 15 March 2022, n°43572/18, *Grzęda v Poland*' (2002) 18(4) *European Constitutional Law Review* 753 at 767 and 779.
[49] *Juszczyszyn v Poland*, supra n 9 at para 333.

made the connection between the requirements of Article 18 and the separation of powers. Of course, it is left to be seen if *Juszczyszyn* inaugurated a new era for Article 18 and its connection to separation of powers. It cannot be disregarded that this Polish case pertained to the *mala fides* restrictions of rights of a judge who issued a judicial decision whereby he intended to verify whether a first-instance judge was lawfully appointed and fulfilled the requirement of independence, in other words, whether the institutional requirements of Article 6(1) of the Convention were complied with.[50] As such, the reference to separation of powers was not necessarily striking.[51]

However, it cannot go unnoticed that these past years the references of the Court to the separation of power have been significant.[52] In *Guðmundur Andri Ástráðsson*, the Grand Chamber made the preservation of the separation of powers inherent part of the new test introduced by the Court for the assessment of whether the irregularities in a given judicial appointment procedure were of such gravity as to entail a violation of the right 'to a tribunal established by law'.[53] The Court explicitly referred to the separation of powers as the object and purpose of the requirement of a tribunal established by law on an equal footing to the very rule of law.[54] The cases on the Polish reform of the judiciary also routinely referred to separation of powers, rendering it a principle of reference for the assessment of the compatibility of the measures with the Convention.[55] In *Dolińska-Ficek and Ozimek v Poland*, the Court went as far to link the separation of powers to Article 46 ECHR. The Court connected the measures required on the part of the Polish State for the implementation of the judgment to the separation of powers: 'In this situation and in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State is required'.[56]

Such developments are relevant to Article 18 too. The Court 'upgraded' the pertinence of separation of powers in its case-law[57] and the explicit reference in *Juszczyszyn*

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[50] *Ibid*. at para 334.
[51] See for example ECtHR, Merits and Just Satisfaction, 23 June 2016, *Baka v Hungary*, n°20261/12 at para 165.
[52] Aikaterini Tsampi, 'The importance of "separation of powers" in the case-law of the European Court of Human Rights: an importance that finally … grew?', *Blogdroiteuropéen*, 2 June 2022, available at: https://blogdroiteuropeen.com/2022/06/02/the-importance-of-separation-of-powers-in-the-case-law-of-the-european-court-of-human-rights-an-importance-that-finally-grew-by-aikaterini-tsampi/ [last accessed 24 February 2023].
[53] ECtHR, Merits and Just Satisfaction, 1 December 2020, *Guðmundur Andri Ástráðsson v Iceland*, n°26374/18, at para 246.
[54] *Ibid*.
[55] E.g. ECtHR, Merits and Just Satisfaction, 7 May 2021, *Xero Flor w Polsce sp. z o.o. v Poland* n°4907/18, at paras 281 and 283; ECtHR, Merits and Just Satisfaction, 22 July 2021, *Reczkowicz v Poland* Application No 43447/19, at para 261; ECtHR, 19 Merits and Just Satisfaction, 8 November 2021, *Dolińska-Ficek and Ozimek v Poland*, n°49868/19 and 57511/, at para 368; ECtHR, Merits and Just Satisfaction, 3 February 2022, *Advance Pharma Sp. Z O.O v Poland*, n°1469/20, at para 345; *Grzęda v Poland*, supra n 47 at para 302.
[56] *Dolińska-Ficek and Ozimek v Poland*, supra n 54 at para 368.
[57] In recent cases, the Court did not refer to the "growing importance" of separation of powers, as it had routinely done since 2002, but rather to its "importance" as such (*Grzęda v Poland*, supra n 47 at para 302; ECtHR, Merits and Just Satisfaction, 7 April 2022, *Gloveli v Georgia* Application No 18952/18, at para 49).

consolidated further this tendency. However, *Juszczyszyn* can be considered just the beginning of a long road. As it was argued at the outset of this paper, a violation of Article 18 is telling of systemic deficiencies in the relation of powers within a State. If it is to be accepted that a violation of Article 18 qualifies as a verdict on its own as per the suffering of judicial independence, then the reference to separation of powers comes as little surprise and one can even claim that it occurred quite late. The connection between separation of powers, independence of the judiciary and Article 18 cannot only occur in Article 18 cases where the applicants are members of the judiciary themselves. It is true that since its first references to the significance of the separation of powers in its case-law in 2002, the Court continued to refer to the importance of the notion of separation of powers in two big categories of cases: a) in cases pertaining to the separation of powers between the executive and the judiciary, with a view to protect the independence of the judiciary; and b) in cases related to the separation of powers between the legislative and the judiciary, with a view to protect the independence of the Parliament.[58] Article 18 is a fertile ground for the expansion of such cases and the contemplation of separation of powers in its 'checks and balances dimension'. It should not go unnoticed that an Article 18 violation is a sing of failure not only of the judiciary but of the legislative as well, to the extent that in most cases where a violation has been found, the adoption of restrictive to rights legislations had also usually occurred.[59] Furthermore, when the reference to separation of powers indeed occurs in Article 18 ECHR cases, the Court can go as far as to adopt an approach similar to the one in *Dolińska-Ficek and Ozimek v Poland*, indicating, in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, rapid remedial action.[60]

4. CONCLUSION

The present paper explored the connection between Article 18 violations and the principles of judicial independence and separation of powers. It argued in particular that such violations operate as 'barometer' and, in some cases, as 'verdict' even on the sanity of judicial independence and separation of powers within a State. The gradual evolution of Article 18 case-law since *Merabishvili* and the recent cases where the violation of Article 18 occurred with respect to judges, allow us to identify Article 18 as a new pilar for judicial independence and separation of powers in the system of the Convention. Given the rule of law issues that remain open in the Council of Europe member States and the determination of the Court to address them, one can expect that Article 18 will

[58] Aikaterini Tsampi, *Le principe de séparation des pouvoirs dans la jurisprudence de la Cour européenne des droits de l'homme* (2019); Laure Milano, 'La séparation des pouvoirs et la jurisprudence de la Cour européenne des droits de l'homme sur le droit à un procès équitable' *Conseil Constitutionnel*, Titre VII, n° 3, October 2019, available at: https://www.conseil-constitutionnel.fr/publications/titre-vii/la-separation-des-pouvoirs-et-la-jurisprudence-de-la-cour-europeenne-des-droits-de-l-homme-sur-le [last accesssed 24 February 2023].

[59] Aikaterini Tsampi, supra n 3 at 148-150.

[60] *Dolińska-Ficek and Ozimek v Poland*, supra n 54 at para 368.

continue to develop in its quality as pillar of judicial independence and separation of powers.